A

RE YOGANANTHY AS THAMBAIYA; EX P IDRIS OSMAN

HIGH COURT MALAYA, JOHOR BAHRU
SYED AHMAD HELMY J
B [BANKRUPTCY NO: 29-1142-2002]
16 MAY 2005

CIVIL PROCEDURE: *Judge - Application to disqualify judge - Allegation of apparent bias - Judge made adverse findings of facts on*
C *plaintiff's conduct in earlier action - Whether findings supported by evidence - Whether there was no real danger of bias - Whether no basis to suspect that fair trial would not be possible*

The plaintiff judgment debtor in this case was facing a bankruptcy action brought against her by the defendant judgment creditor.
D The bankruptcy proceeding apart, the plaintiff had filed her own action against the defendant *vide* Suit No. 22-160-1995 (the suit'). The suit, however, had been struck out by the learned judge on account of the plaintiff/her solicitor's absence at the hearing and for want of prosecution. The plaintiff applied for a
E reinstatement of the suit, but the application was dismissed. The fact showed that in so dismissing the suit, the learned judge, in his written judgment, commented that the plaintiff had been indolent, that she was defiant and unremorseful and that her claim had no real chance of success. The plaintiff contended that by
F virtue of the adverse comments thus made, there was a real danger of bias if the learned judge were to continue to sit in the bankruptcy proceedings, and in the circumstances applied for the learned judge to recuse himself from hearing all matters relating thereto. The issue was whether, on the facts and in the
G circumstances, there was a to real danger of bias on the part of the learned judge, such that he ought in all fairness disqualify himself from hearing and adjudicating on the bankruptcy proceedings against the plaintiff.

H **Held (dismissing the application):**

(1) An allegation of bias can take two forms, namely an allegation of actual bias or an allegation of apparent or apprehended bias. Regardless which limb an applicant
I proceeds upon, the threshold for finding actual or

apprehended bias is high. The threshold is high because a finding of bias calls into question not just the personal integrity of the judge but the integrity of the entire administration of justice *(Marchand v. Public General Hospital Society of Chatham)*. (para 9)

(2) The present application does not involve the actual bias limb. It only involves the second limb, namely apparent or apprehended bias. (para 12)

(3) The test for apparent bias is "whether, having regard to the circumstances, there was a real danger of bias on the part of the relevant member of the tribunal in question, in the sense that he might fairly regard (or have unfairly regarded) with favour, or disfavour, the case of a party to the issue under consideration by him" *(R v. Gough; Majlis Perbandaran Pulau Pinang v. Syarikat Bekerjasama-sama Serbaguna Sungai Gelugor dengan Tanggungan; Alor Janggus Soon Seng Trading Sdn Bhd & Ors v. Sey Hoe Sdn Bhd)*, **or**, less stringently put "whether the fair-mainded informed observer, having considered the facts, would conclude that there was a real possibility that the tribunal was biased" *(Magill v. Porter and Weeks)*. The two tests notwithstanding, "the distinction between them was a fine one and the difference cannot arguably influence the outcome" *(Man O'War Station Ltd v. Auckland City Council)*. (paras 12-16)

(4) The plaintiff's application upon which the written judgment was founded was for reinstatement of the suit and the setting aside of the judgment of the defendant's counterclaim given in the absence of the plaintiff and her counsel. Invariably, the application calls for the exercise of the court's discretion and warrants the court to evaluate the relevant factors and make findings thereon. (para 18)

(5) The observation that the plaintiff was indolent and had failed to prosecute her claim promptly and was delaying conclusion of the case by changing solicitors around the time the action was scheduled for trial, cannot be evidence of apparent bias. The law has always required a claim to be brought within a reasonable time, and so a judge is entitled to form the view, based on the facts, that a party has not exercised reasonable diligence in prosecuting her claim and was delaying the

A conclusion of the trial. Further, such finding of fact on the plaintiff's conduct is a pertinent factor for consideration by the court whether to exercise the discretion in her favour. Hence, it cannot be evidence of apparent bias or give rise to real danger of bias. (paras 19 & 20)

B

(5a) The factual finding was also supported by the available evidence. The facts showed that the case had been fixed for hearing on several occasions prior to 16 October 2000. The plaintiff/her solicitor's absence, on the other hand, was C attributable to the self-created confusion of the plaintiff's solicitor in taking the hearing date. No plausible explanation was offered for the delay and the plaintiff's unremorseful attitude was reflected in her failure to acknowledge that her solicitor had obtained or recorded the wrong dates. There D was also the uncontroverted evidence of the plaintiff changing solicitors. Clearly, the finding as to the plaintiff's indolence was not one made "otherwise than on the evidence". It was also not a finding on the plaintiff's credibility, and therefore cannot be indicative that I will not E be able to bring an impartial mind to bear on any future applications in this case. (paras 21 & 22)

(5b) Likewise, the finding that the plaintiff has no real prospect of succeeding cannot give rise to apparent bias. The F plaintiff's claim was for damages or alternatively for specific performance of the Sale Agreement dated 8 February 1988 and, in defending the action, the defendant had filed a counterclaim for the sum of RM507,999.50 based on overpayment. The finding that she had no real prospect of G succeeding was based on the evidence before the court at that time, in that there was ample evidence of overpayment and corroboration of same by the defendant's witness. Therefore, the allegation of apprehended or apparent bias on this score cannot be sustained. (para 23)

H **(6)** The plaintiff's claim cannot also be sustained in law. If such a contention were upheld in law, it would affect public confidence in the judiciary and will certainly undermine the integrity of our administration of justice. (para 24)

I

Case(s) referred to:

Abitibi-Price Inc., Stephenville Division v. Canadian Paperworkers Union, Local 1093 [1985] 18 LAC (3d) 143 (Nfld) ***(refd)***

Alor Janggus Soon Seng Trading Sdn Bhd & Ors v. Sey Hoe Sdn Bhd [2002] 4 CLJ 268 CA ***(refd)***

American Cyanamid Co v. Ethicon Ltd [1975] AC 396 ***(refd)***

Bainton v. Rajski [1992] 29 NSWLR 539 ***(refd)***

Magill v. Porter and Weeks [2002] 1 All ER 465 ***(refd)***

Majlis Perbandaran Pulau Pinang v. Syarikat Bekerjasama-sama Serbaguna Sungai Gelugor dengan Tanggungan [1999] 3 CLJ 65 FC ***(refd)***

Malayan Banking Bhd v. Syed Mansor Syed Salim [1999] 6 CLJ 578 HC ***(refd)***

Man O'War Station Ltd v. Auckland City Council [2002] UKPC 28 ***(refd)***

Marchand v. Public General Hospital Society of Chatham et al [2000] 138 OAC 201 ***(refd)***

McKenzie v. Canadian Human Rights Commission [1985] 85 CLLC 16 ***(refd)***

R v. Bow Street Metropolitan Stipendiary Magistrate & Ors, ex p Pinochet Ugarte (No. 2) [1999] 1 All ER 577 ***(refd)***

R v. Gough [1993] AC 646 ***(refd)***

R v. RDS [1997] 3 SCR 484 ***(refd)***

R v. Sussex Justices ex p McCarthy [1924] 1 KB 256 ***(refd)***

Re JRL, ex p CJL [1986] 161 CLR 342 ***(refd)***

Tang Liang Hong v. Lee Kuan Yew & Anor And Other Appeals [1998] 1 SLR 97 ***(refd)***

White et al v. True North Springs Ltd et al [2001] 209 Nfld & PEIR 1 ***(refd)***

Legislation referred to:

Legal Profession (Practice and Etiquette Rules) 1978, r. 56

Other source(s) referred to:

ER Hardy Ivamy, *Mozley & Whiteley's Law Dictionary,* 10th edn

Halsbury's Laws of Australia 1996, vol 8, para 125-290, pp 159, 236

Snell's Equity, 2000, 30th edn, p 33

For the judgment debtor - Dominic J Puthucheary; M/s Puthucheary Firoz & Mai

For the judgment creditor - PK Nathan (Fadzilah Mansor with him); M/s PK Nathan & Co

Reported by WA Sharif

A

JUDGMENT

Syed Ahmad Helmy J:

[1] The application in encl. 74 is by the judgment debtor/plaintiff for an order that I recuse myself from hearing all matters relating to the bankruptcy proceeding including the appeals to the judge in chambers in encls. 56 and 29. The grounds appears in the supporting affidavit of Yogananthy a/p A.S. Thambaiya in encl. 73 and is principally premised on certain findings or observations I made in my written judgment dated 26 February 2002 relating to the judgment debtor/plaintiff's application for reinstatement of the action in suit No. 22-160-1995 and the setting aside of the judgment given on the counterclaim on 16 October 2000 which allegedly raises a real danger of bias. In that application, the parties filed nine [9] affidavits and after hearing both parties and reading the affidavits that had been filed, I accordingly dismissed the judgment debtor/plaintiff's application with costs and the reasons appears in my written judgment dated 26 February 2002 (hereinafter called 'the judgment').

[2] To support his contention of bias, learned counsel for the judgment debtor/plaintiff Dato' Dominic Puthucheary relies on the following findings or observations I made in the judgment: (1) that the judgment debtor/plaintiff had been indolent and had failed to prosecute her claim expeditiously; (2) that she was defiant, unremorseful, imputing blame on judgment creditor/defendant's solicitors; (3) that her claim had no real prospect of succeeding; (4) that she has a lackadaisical attitude and failed to show that her absence was accidental and due to mistake. The judgment debtor/plaintiff's counsel aforesaid contends that in light of these findings or observations, there is a real danger of bias if I continue to sit as a judge in the bankruptcy proceedings herein.

[3] This area of law is to my mind well settled. In *Halsbury's Laws of Australia*, 1996, the law has been succinctly stated that a judge may be disqualified from hearing or determining a case or matter by reason of actual bias or apparent bias (see Vol. 8 para 125-290 at 236, 159). The rules on bias were developed along the tenet that "justice should not only be done, but should manifestly and undoubtedly be seen to be done", per Lord Hewart in *R v. Sussex Justices ex p McCarthy* [1924] 1 KB 256.

[4] Preserving public confidence in the judiciary with the appearance of justice being done in each case is undeniably a matter of great importance. Although justice should be "seen to be done", the need for the appearance of justice, however, cannot supplant the requirement that in every case justice must be done. That in the final analysis is what actually matters. Hence, the mere allegation of bias made against a judge is not sufficient to disqualify him. In *Tang Liang Hong v. Lee Kuan Yew & Anor And Other Appeals* [1998] 1 SLR 97, LP Thean JA said:

> A claim that there is apparent bias on the part of a judge must be based on facts that are substantially true and accurate. The fact that an allegation of bias has been made against a judge is not enough; otherwise a party could secure a judge of his choice by merely alleging bias or apparent bias on the part of another or other judges. A judge is not obliged to withdraw based on facts which are inaccurate, false or devoid of substantiation.

[5] The learned judge found support for the statement of law above in *Re JRL, ex p CJL* [1986] 161 CLR 342 where Mason J (as he then was) said:

> Although it is important that justice must be seen to be done, it is equally important that judicial officers discharge their duty and do not, by acceding too readily to suggestions of appearance of bias, encourage parties to believe that by seeking the disqualification of a judge, they will have their case tried by someone thought to be more likely to decide the case in their favour.

[6] In similar vein, Mahoney JA in *Bainton v. Rajski* [1992] 29 NSWLR 539, when dealing with an application to disqualify him and another judge from forming part of an appellate bench said:

> It is accepted that justice must be done in fact and that the appearance of justice must be maintained. But that, and particularly the latter, does not require that, if a party alleges or even believes in the disqualifying facts alleged, the judge should withdraw. If that were so, the administration of justice and the rights of other parties would be governed by the allegation of or the belief in facts, however dishonest, paranoiac, unbalanced or honestly wrong.

[7] It is evident from the authorities referred to above that a judge ought not to recuse himself from any case merely because an allegation of bias or apparent bias is made. On an occasion such as this where an allegation of apparent bias is levelled against

a judge, he has a duty not to accede readily to the suggestion of the appearance of bias, for those suggestions may be "dishonest, paranoiac, unbalanced or honestly wrong", per Mahoney JA in *Bainton v. Rajski.* Unpleasant as it may be, a judge must set out to ascertain if there is any basis for the allegation. That is what I intend to do here.

[8] What is bias? McNair J delivering the judgment of the Federal Court in the Canadian case of *McKenzie v. Canadian Human Rights Commission* [1985] 85 CLLC 16, 148 at 17,017 articulated that:

> Bias is a state or attitude of mind but the factual question, in the legal context, is whether the circumstances point realistically and substantially to the real likelihood or reasonable suspicion of bias beyond the qualms of an overly sensitive or scrupulously zealous conscience. A court cannot look into a party's mind to evaluate the probabilities so the question must be answered by inferences drawn from the circumstances or by the manifest, outward appearance of things. In the final analysis, the test is whether the reasonable apprehension of bias is one that a reasonably well-informed person could properly have of a biased appraisal and judgment of the issues to be determined by the maker of or participant in the decision.

Bias was also explained in *Abitibi-Price Inc., Stephenville Division v. Canadian Paperworkers Union, Local* 1093 (1985), 18 LAC (3d) 143 (Nfld.) at 151 where it is stated that bias is:

> Anything which tends or may tend to cause a person who is judging a case to do so **otherwise than on the evidence.** (emphasis added)

[9] Now, an allegation of bias can take two forms, namely, an allegation of actual bias or an allegation of apparent or apprehended bias. Regardless which limb an applicant proceeds upon, the threshold for finding actual or apprehended bias is high. This is evident from the decision of the Ontario Court of Appeal in *Marchand v. Public General Hospital Society of Chatham et al.* [2000] 138 OAC 201. The Court of Appeal in *Marchand* referred to the Supreme Court of Canada in *R. v. R.D.S.* [1997] 3 SCR 484 and concluded that:

> Courts presume that judges will carry out their oath of office. Thus, to make out **an allegation of judicial bias, requires cogent evidence. Suspicion is not enough. The threshold is high** because a finding of bias calls into question not just the personal integrity of the judge but the integrity of the entire administration of justice, (emphasis added)

[10] There is nothing in Malaysian jurisprudence to suggest that the principles in the Canadian decisions referred to above do not apply with equal force here. On the contrary, I am of the view that the principles in those passages referred to are of universal and general application.

[11] Bearing these matters in mind, I now turn to consider the 2 limbs of bias. Actual bias results in the automatic disqualification of a judge. Traditionally this category was limited to cases where the judge has an interest in the outcome of the matter he is adjudicating. This category has its genesis in the maxim *nemo debetjudex esse in causa sua propria* that is no one ought to be a judge in his own cause (see *Mozley & Whiteley's Law Dictionary*, 10th edn. by E.R. Hardy Ivamy). The House of Lords extended the possible cases that may come within the actual bias category in *R v. Bow Street Metropolitan Stipendiary Magistrate & Ors, ex p Pinochet Ugarte (No. 2)* [1999] 1 All ER 577. In *Pinochet*, Lord Hutton said:

> There could be cases where the interest of the judge in the subject-matter of the proceedings arising from his strong commitment to some cause or belief or his association with a person or body involved in the proceedings could shake public confidence in the administration of justice as much as a shareholding (which might be small) in a public company involved in the litigation.

[12] The present application does not involve the actual bias limb. It only involves the second limb, namely, apparent or apprehended bias. In *R v. Gough* [1993] AC 646, Lord Goff stated the test for apparent bias as follows:

> In conclusion, I wish to express my understanding of the law as follows. I think it possible, and desirable, that the same test should be applicable in all cases of apparent bias, whether concerned with justices or members of other inferior tribunals, or with jurors, or with arbitrators. Furthermore, I think it unnecessary, in formulating the appropriate test, to require that the court should look at the matter through the eyes of a reasonable man, because

A the court in cases such as these personifies the reasonable man; and in any event the court has first to ascertain the relevant circumstances from the available evidence, knowledge of which would not necessarily be available to an observer in court at the relevant time. Finally, for the avoidance of doubt, *I prefer to state*
B *the test in terms of real danger rather than real likelihood, to ensure that the court is thinking in terms of possibility rather than probability of bias. Accordingly, having ascertained the relevant circumstances, the court should ask itself whether, having regard to those circumstances, there was a real danger of bias on the part of the relevant member of the tribunal in question, in the sense that he might unfairly regard (or have unfairly*
C *regarded) with favour, or disfavour, the case of a party to the issue under consideration by him.*

[13] Lord Woolf agreed with Lord Goff and in his speech in *Gough* said that the test is 'whether there is a real danger of
D injustice having occurred as a result of the alleged bias'. The apparent bias test in *Gough* received the Federal Court's endorsement in *Majlis Perbandaran Pulau Pinang v. Syarikat Bekerjasama-sama Serbaguna Sungai Gelugor dengan Tanggungan* [1999] 3 CLJ 65 and the most recent application of that test at appellate
E level was in *Alor Janggus Soon Seng Trading Sdn Bhd & Ors v. Sey Hoe Sdn Bhd* [2002] 4 CLJ 268.

[14] Dennis Ong JCA in *Alor Janggus* case *(supra)* stated at p. 275:

F The test of apparent bias applied in our Courts was decisively settled by the Federal Court in *Majlis Perbandaran Pulau Pinang v. Syarikat Bekerjasama Serbaguna Sungai Gelugor dengan Tanggungan* [1999] 3 CLJ 65 per Edgar Joseph Jr. FCJ and consistently adhered to in *Allied Capital Sdn. Bhd. v. Mohamed*
G *Latiff bin Shah Mohd. & Another Application* [2001] 2 CLJ 253 at page 259 per Mohtar Abdullah FCJ and in *Mohamed Ezam bin Mohd. Nor & Ors v. Ketua Polis Negara* [2001] 4 CLJ 701 per Mohamed Dzaiddin CJ. That test was the real danger of bias test settled by the House of Lords in *Req v. Gough (HL (E))* [1993] AC 646 at page 670F per Lord Goff of Chieveley ...

H **[15]** The stringent test in *Gough* was adjusted in *Magill v. Porter and Weeks* [2002] 1 All ER 465. Lord Hope of Craighead restated the test, namely that "the question is whether the fair-minded and informed observer, having considered the facts, would conclude
I that there was a real possibility that the tribunal was biased", to place greater emphasis on the view of a fair-minded observer and

not the view of the court. Lord Steyn in his speech in the Privy Council case *Man O'War Station Ltd v. Auckland City Council* [2002] UKPC 28 observed that:

> This adjustment is consistent with European and Scottish jurisprudence, and is broadly in line with Australian jurisprudence. Both tests proceed from the point of view of an informed view of the facts, and both concentrate on the possibility of bias. But the adjusted test emphasises the perspective of the fair-minded observer rather than the view of the court.

[16] However, Lord Steyn pointed out that the distinction between the two tests was a fine one. He said:

> The adjusted test emphasises the perspective of the fair-minded observer rather than the view of the court. ... *the distinction is a fine one, notably since even on the Gough test the court undoubtedly had to take account of public perception and confidence.* On the facts of the present case the difference between the two tests cannot arguably influence the outcome. (emphasis added)

[17] The observations and findings that I made it must be stressed is in the context of whether the judgment debtor/plaintiff has satisfied the court that based on the evidence as presented by her the court ought to exercise its discretion in her favour in reinstating the action and setting aside the judgment of the counterclaim arising from her and her counsel's absence on the day of trial.

[18] It must be stressed that the application by the judgment debtor/plaintiff upon which my judgment was founded was for reinstatement of the action and setting aside the judgment of the counterclaim in the absence of plaintiff and her counsel which application invariably calls for the exercise of the court's discretion and which warranted the court to make an evaluation of several factors and make a finding thereon. The several factors which the court had to consider and arrive at a finding includes consideration on whether the setting aside of the judgment would entail a complete retrial of the matter, whether applicant has real prospect of success and the conduct of the applicant *Malayan Banking Bhd v. Syed Mansor bin Syed Salim* [1999] 6 CLJ 578.

[19] Applying the test in *Gough* to the present circumstances, is there a real danger of bias? Insofar as my observation that the judgment debtor/plaintiff was indolent and had failed to prosecute her claim promptly and was delaying conclusion of the case by

changing solicitors around the time where the action was scheduled for trial, I fail to see how this can be evidence of apparent bias. The law has always required a claim to be brought within a reasonable time and this requirement has been developed along the lines of the renowned maxim of equity that 'equity aids the vigilant and not the indolent' (see *Snell's Equity* (30th edn, 2000) p 33).

[20] If a judge or a tribunal forms a view from the facts of a case that one party had not exercised reasonable diligence to prosecute her claim and was delaying the conclusion of the trial, that is, in my view, a finding of fact of the conduct of the plaintiff and which is a pertinent factor for consideration in persuading the court to exercise discretion in her favour. Such factual finding surely cannot be evidence of apparent bias or give rise to a real danger of bias. If every factual finding gives rise to a real danger of bias, all judges would have to be disqualified soon after they arrive at a factual finding that is against one party to the proceeding before them.

[21] The only question that needs to be asked here is whether the evidence available supported the finding. The evidence shows that the case had been fixed for hearing on several occasions prior to 16 October 2000 and the absence to attend the hearing was based on the self created confusion of the plaintiff's solicitors in the miscommunication of the date for hearing and that no bundle of documents were filed by the plaintiff's solicitors prior or at the date of hearing on 16 October 2000. There was also uncontroverted evidence of the plaintiff changing solicitors. No plausible explanation was offered for the delay and the unremorseful attitude is reflected in her failure to acknowledge in any of the supporting affidavits that her solicitors obtained or recorded the wrong dates and even went to the extent of imputing blame on the defendant's solicitors for non-compliance of r. 56 of the Legal Profession (Practice and Etiquette Rules) 1978 which blame to others, justifiably or not, cannot absolve the plaintiff from his personal lack of diligence in prosecuting her claim. Clearly, the finding aforesaid was not one made "otherwise than on the evidence" as in *Abitibi-Price Inc*. My findings in that regard, consequently, were not based upon bias but upon evidence. The findings cannot be indicative that I will not be able to bring an impartial mind to bear on any future applications in this case. On the facts, even applying the less stringent test in *Magill* cannot arguably influence the outcome that the threshold for a case of

apprehended or apparent bias has not been satisfied. It cannot be gainsaid that a fair-minded observer, given the relevant circumstances and available evidence, would not perceive bias or consider there to be a real danger of bias if I continued to sit as a judge in this matter.

[22] In addition, the finding that the judgment debtor/plaintiff in this case had not exercised reasonable diligence and was indolent is not a finding relating to the plaintiff's credibility. That finding also cannot be reasonably said to be a reflection of the plaintiff's character or be taken to impugn the plaintiff's person in any way. It is a finding of fact, based on the evidence, of the lack of speed at which the plaintiff prosecuted her claim which tantamount to abusing the process of the court in maintaining proceedings with no intention of carrying the case to trial. On the authority of past precedent, I am of the view that this cannot constitute evidence of apparent bias. I find support for this conclusion in *White et al. v. True North Springs Ltd. et al.* [2001] 209 Nfld. & P.E.I.R. 1 where Hall J, though having made harsh comments on the credibility of certain witnesses, held that this did not constitute bias as the decision on credibility was arrived at on the evidence before him. The reported judgment in this case actually states that Hall J had remarked during the course of proceedings that one of the parties had taken a "cheap shot". Even so, Hall J ruled that having regard to the entire circumstances and evidence in that case, his remark could not give rise to a real danger of bias.

[23] Turning now to the finding that the judgment debtor/plaintiff has no real prospect of succeeding, I am also of the view that this finding cannot give rise to apparent bias. The plaintiff's claim was for damages or alternatively *in lieu* of damages specific performance of the sale agreement dated 8 February 1988 and in defending the action the judgment creditor/defendant counterclaimed for the sum of RM507.999.50 based on overpayment. The finding that she had no real prospect of succeeding was, in my view, grounded on the evidence before the court at that time in that there was ample evidence of overpayment and corroboration of same by the judgment creditor/defendant's witness. On the test in *Abitibi-Price Inc*, the allegation of apprehended or apparent bias on this score, therefore, cannot be sustained.

[24] Taking this point a step further, can the judgment debtor/plaintiff's allegation be otherwise sustained in law? I am of the view that it cannot. If such a contention were upheld in law, the inevitable consequence is that it will affect public confidence in the judiciary. It will certainly undermine the integrity of our administration of justice. To illustrate the point, a parallel can be drawn from cases where a party applies for an interlocutory injunction. One of the criteria for a plaintiff/applicant to satisfy is that the plaintiff has some prospect of succeeding in his claim for a permanent injunction at the trial – see *American Cyanamid Co. v. Ethicon Ltd.* [1975] AC 396. Does this mean that a judge who rules that an interlocutory injunction ought not to be granted because the plaintiff has no real prospect of succeeding at the trial is biased? Must the judge then disqualify himself from sitting as a trial judge in that case? To sustain such a contention would, in my view, lead to disastrous consequences and would inevitably undermine the integrity of the administration of justice in this country.

[25] Likewise, take a case where a plaintiff applies for summary judgment and a judge decides that the defendant has no defence to the plaintiff's claim. On appeal, the decision is reversed and the case remitted to the court of first instance for trial. Must the judge at first instance recuse himself from the trial? Can it be said in these cases that the judge's finding gives cause for apprehended or apparent bias? Could a fair-minded observer reasonably entertain the fear of a real danger of bias if the matter proceeded before the same judge? In such circumstances, I am of the view that no reasonable bystander or fair-minded observer could reasonably entertain the thought of bias. Only the "qualms of an overly sensitive and scrupulously zealous conscience" would in such circumstances entertain the thought of bias, per McNair J in *McKenzie*.

[26] For the aforesaid reasons and based on the authorities referred to, the allegation of apparent bias is unsubstantiated. Due to the adverse effects an application of this nature can have on the image of the administration of justice in this country, it is perhaps significant to call to mind the sage words of Sir Thomas Bingham MR in the Court of Appeal case of *Arab Monetary Fund v. Hashim & Ors* (The Times, 4 May 1993), (*The Independent*, 30 April 1993, transcript) where the learned judge said:

> Just as an inference of apparent bias is not to be lightly drawn, so such a charge is not to be lightly made. That remains true even where, as here, any suggestion of actual bias is expressly disclaimed. Cases may unhappily arise in which evidence of bias or apparent bias is so clear that an application for the discharge or removal of a judge is justified. But such an application is never justified simply by the instructions of the client. Counsel's duty to the court and to the wider interests of justice in our judgment requires that he should not lend himself to making such an application unless he is conscientiously satisfied that there is material upon which he can properly do so.

[27] Maintaining public confidence in the administration of justice in this country is the duty and responsibility of all parties who participate in the process of dispensation of justice. Applications of this nature should not be made lightly unless there is clear evidence of bias or apparent bias. As the court observed in *Marchand*, it is not simply the personal integrity of a judge that is at stake but the integrity of the entire administration of justice. As there is no case of apprehended bias made out here, encl. 74 is hereby dismissed with costs.